Filed 10/5/10 Almundai v. Dealer Services Corp. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

KEVIN ALMUDAI, Plaintiff and Appellant, v. DEALER SERVICES CORPORTION, Defendant and Respondent.	H034971 (Santa Clara County Super.Ct.No. CV110703)

Kevin Almudai worked for Dealer Services Corporation (DSC) as the manager of its San Jose branch office, which opened in mid-2006. DSC's business is borrowing money from large financial institutions and, in turn, lending it to car dealers for the purchase of inventory, which secures the loans. Almudai contends that DSC failed to pay him incentive branch bonuses owed to him for the calendar years 2006 and 2007. DSC bonuses are paid according to a company bonus plan, as generally described in written documents provided to Almudai in 2006 and 2007. The plan contemplates applying certain formulas for determining whether a branch bonus is due for a given year and, if so, its amount. But in order for a manager to be eligible for a branch bonus in any year, the branch had to meet 80 percent of its annual earnings goal, as adjusted, and the loan write-offs attributed to that branch had to total less than four percent of the branch's average accounts receivable over the calendar year.

Almudai did not receive a branch performance bonus for 2006 but he continued working for DSC. After he did not receive a branch performance bonus for 2007, he quit his job, effective January 31, 2008, because he felt he was entitled to a bonus. He then filed a complaint against DSC, alleging in three causes of action that it had failed to timely pay him wages owed in the form of bonuses for 2006 and 2007 under Labor Code section 202, that DSC's failure to pay was willful so that waiting time penalties attached under Labor Code section 203, and for an accounting. DSC moved for summary judgment, contending that for 2006, the San Jose branch did not meet 80 percent of its adjusted budget target and for 2007, that its write-offs were over four percent of its average accounts receivable, such that Almudai was not eligible for a branch performance bonus in either year.

The trial court granted DSC's motion. Almudai appeals from the judgment, reprising his contentions raised in opposition to the motion below, all of which relate to factors affecting various formulations for calculating whether bonuses were due in 2006 and 2007 under the plan. Although Almudai contends that he was entitled to bonuses for 2006 and 2007 based on how the bonus formulations should have been fairly calculated, he points to no evidence that shows the existence of a triable issue of material fact on the issue whether the bonuses were due and to no particular provision of the bonus plan that DSC allegedly breached or that should have been construed differently so as to entitle him to a bonus for either year. We accordingly affirm.

STATEMENT OF THE CASE

I. *Factual Background*[1]

DSC is an Indiana Corporation whose nationwide business involves borrowing money from large institutional lenders and in turn lending money to car dealers in order

[1] We take the underlying facts from the papers filed below in support of and in opposition to summary judgment.

to finance their purchase of inventory, which serves as collateral for the loans. DSC maintained a branch office in Los Angeles, which at that point had generated some existing accounts in northern California. In early 2006, DSC opened its first California branch office north of Los Angeles, in Fresno.

In June 2006, DSC, through Jason Cook, a company regional vice-president, hired Almudai as an Area Manager in the northern California market. He was to open a DSC branch in San Jose and expand business in the surrounding area. The parties signed a Letter of Intent, which provided that Almudai's starting base salary was to be $80,000 and that he, as an Area Manager, would be afforded the opportunity to participate in the company's bonus compensation program. According to the written "2006 Bonus Breakdown Area Service Manager," which the parties signed, this program had two components—a corporate performance bonus and a branch performance bonus, each of which would be calculated according to particular formulas. The corporate performance bonus would be based on the annual performance of the company as a whole and would constitute 25 percent of the total bonus potentially available to Almudai that year. The branch performance bonus would be based on the annual performance of the San Jose branch according to particular formulas and would constitute the remaining 75 percent of the potentially available bonus. Based on his receipt of these two documents, Almudai generally understood the basic elements of the bonus program.

As conditions for a manager's entitlement to the branch performance bonus, the only component of the bonus program at issue here,[2] the particular branch was required to earn 80 percent of its annual profitability target, sometimes referred to as Earnings Before Taxes (EBT), as adjusted, and the loan write-offs attributable to that branch could not exceed four percent of the branch's rolling average accounts receivable over the

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[2] Almudai was paid a company performance bonus for the years 2006 and 2007 and he makes no claim as to this aspect of the bonus compensation program for either year.

calendar year. Each branch was generally provided with its EBT at the beginning of the year and monthly reports in the form of profit and loss statements showing adjustments and progress toward that goal. According to the DSC Management Guide, a branch's EBT was adjusted monthly to factor for bad debts.[3] According to DSC, the EBT for a particular branch would be developed in relation to the geographical market area associated with that branch, which for San Jose, was the greater Bay Area market, not the entirety of northern California.

Almudai started the job on July 10, 2006. He was charged with opening and staffing an office but he worked for several months without one, mostly out of his house and car. The San Jose branch was provided with a profitability target, or EBT, for 2006 but according to Almudai, it did not reflect that the branch was new and operational for only about five months that year. The branch office officially opened toward the end of 2006 and 10 or 12 local accounts that had been generated in DSC's Los Angeles or Fresno branches were transferred to the San Jose branch in around October or November. These were small accounts and some of them were already in default such that Almudai's charge with respect to them was to try to salvage or collect on them.

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[3] According to the DSC Branch Management Guide, each branch's EBT was adjusted monthly solely for bonus calculation purposes as reflected in the monthly Bonus Calculation Supplemental Schedule. There are two adjustments made. First, each "branch is budgeted to allow for 3.5 [percent] of budgeted average receivables for bad debt expense. The purpose of this adjustment line is to 'true up' the allowed bad debt by adjusting for the increase or decrease in the actual average receivable. Monthly, the difference between actual and budgeted average receivable is multiplied by 3.5 [percent]. The result will create a positive or negative adjustment to the branch budget, depending on whether the actual average receivable is higher or lower than budget. If, for example, actual receivables are higher than budgeted receivables, a credit will be given against the branch budget to reflect the additional allowance." Second, an "adjustment is made to the branch EBT Pre-Bonus for a delinquency factor, . . ." Thus, "[f]or purposes of bonus compensation based on branch performance, a branch's EBT is adjusted to allow for 3.5 [percent] bad debt expense. This adjusted number is the number used to calculate whether a branch has met its EBT budget in order to determine eligibility for branch based bonus compensation."

There was a geographic territory assigned to the San Jose branch but, according to DSC, it was generally the greater Bay Area markets. That said, because there were then no other branches in the northern California region other than Fresno, Almudai was free to generate business anywhere in northern California, generally defined as all areas north of the central valley region that was tied to the Fresno branch office. But there were no limitations on DSC's ability to open another branch anywhere within northern California at its pleasure and no limitations on its ability to transfer accounts among branches based on the regional manager's assessment, in consultation with general managers, about which branch could best manage a particular customer. There was also no requirement that DSC adjust a branch's EBT based on the opening of another branch in the same region or the transfer of accounts between branches.

At the end of 2006, Cook, as Almudai's supervisor, reviewed his performance for that calendar year. Cook said that Almudai had met specified goals as an Area Manager of the new San Jose branch office and he provided Almudai with a written review showing this. But Cook also said that while Almudai was eligible for the 2006 company performance bonus, he was not eligible for a branch performance bonus. On the one hand, Almudai said in his deposition that Cook did not provide a specific reason for this lack of eligibility. But also according Almudai's deposition transcript and a later declaration filed in opposition to DSC's motion, he was told that the branch write-offs for the year had exceeded four percent of the average accounts receivable for 2006, precluding his branch based bonus for that year, and that the accounts that had been written off included Auto Nexus and Gilroy Mitsubishi. Further according to Almudai, Cook represented that because these accounts were being written off in 2006, Almudai was starting 2007 "clean" with no write offs or accounts in default. From DSC's perspective, the reason Almudai was not eligible for a branch bonus for 2006 was not because of the extent of branch accounts receivable but instead because the branch did not meet 80 percent of its adjusted targeted budget or EBT. Still, Almudai felt he had earned the branch performance bonus for 2006 and was surprised when he did not get it because in his view, his performance had exceeded expectations.

Almudai received a raise in base salary beginning in 2007 to $81,200 and his title changed from Area Manager to General Manager. Although his duties did not change, DSC changed the scope of its managers' responsibility from nonexclusive, general geographical areas to management of a single branch within a specific market. That is, Almudai became the General Manager of the San Jose branch, the market reach of which extended to the greater Bay Area, as it had before. But he no longer had responsibility for any particular geographical area. It is not clear in the record whether this change precluded Almudai from developing business opportunities in northern California areas outside the greater Bay Area.

DSC's bonus program did not change in 2007. And early that year, Almudai received a targeted budget or EBT for the San Jose branch for purposes of his 2007 bonus eligibility. He also received documents entitled "DSC Management Guide Branch Compensation Programs" and "2007 General Manager Bonus Program." Concerning the allowable level of write-offs for bonus eligibility, the first of these documents provided that "[w]ithin the calendar year, if branch write off ends up at 4 [percent] or greater of the Average Branch Receivable, the Branch Based Objectives terminate and are removed from the bonus program." The latter document in effect said the same thing, specifically providing that "[b]ranches that write off 4 [percent] or greater of their Calendar year Rolling Average Receivable lose all Branch based bonus opportunities." These written policies regarding calculation of bonus eligibility did not change what DSC's actual policy had previously been in practice.

In May of 2007, employees, including Almudai, were asked to sign a "Bonus Eligibility Acknowledgment" form that further discussed the bonus program and that became a part of the DSC employee handbook. When he signed the form, Almudai asked his boss, Cook, what the purpose of the form was and was told that there had been confusion about bonus eligibility and the form was just to make sure that people understood what the bonus eligibility was. Almudai asked if the form changed the bonus program in any way and he was told no. Almudai understood the bonus program as provided in the documents and there was nothing about the documents that he didn't understand.

The San Jose branch performed well in 2007 in terms of meeting its targeted budget or EBT. In fact, it far exceeded the target, coming in at 293 percent of it and putting Almudai on pace to receive the highest possible branch performance bonus—a "tripler"—for branch performance exceeding 125 percent of its targeted budget. This, notwithstanding that DSC had opened a branch office in Sacramento at some point mid-year, which was associated with that market area, and that some accounts previously developed by the San Jose branch in the Sacramento area were transferred to the new branch. The EBT for the San Jose branch was not adjusted after the opening of the Sacramento branch to account for these factors.

During the year, Cook kept Almudai apprised of the level of branch write-offs and every month, the company issued profit and loss statements for each branch that showed financial performance, including progress toward the targeted budget, or EBT, as adjusted, and what accounts were in default and being written off. Around May of 2007, Almudai asked Cook why the Gilroy Mitsubishi and Auto Nexus accounts were still showing on monthly profit and loss reports as current write-offs in 2007, as he thought they had been written off in 2006. Cook responded that this was due to a corporate record-keeping function but that Almudai should not worry because based on branch earnings, he was then on track to receive a "tripler" branch bonus for that year. But as of September 2007, Cook told Almudai that he would have to increase his accounts receivable in order reduce the level of write-offs counting against that average in order to remain eligible for the branch performance bonus.

In the end, DSC determined that Almudai was not eligible for the branch performance bonus for 2007 because even though the San Jose branch had well exceeded its targeted budget or EBT, its three write-offs taken in that year—the Auto Nexus, Gilroy Mitsubishi, and Luxury Imports accounts—constituted 4.18 percent of the branch's average accounts receivable, which exceeded the allowable percentage by .19 percent (write-offs of $348,086 divided by rolling average receivables of $8,322,228). DSC provided Almudai with a document that showed the calculations leading to the conclusion that he was not entitled to a branch performance bonus, which would have totaled $77,952 but for the combined three write-offs that together totaled 4.18 percent of the branch's average accounts receivable for the year.

This surprised Almudai because, as noted, he thought that two of the three accounts—Auto Nexus and Gilroy Mitsubishi—had been written off by DSC in 2006. But according to DSC's three-prong criteria for the timing of write-offs, the accounts could not have been written off in 2006 even though they may have then been considered as potential write-offs because they were in default. Almudai also felt that Auto Nexus, a delinquent account the branch had inherited from the start, should not be counted among the write-offs attributed to the San Jose branch in either year. And he thought that the write-off of the Luxury Imports of Sacramento account was not handled properly by DSC such that it should not have counted against the San Jose branch's write-offs for 2007. He also felt that DSC had not exhausted efforts to reduce Luxury Import's delinquency by repossessing available vehicles that collateralized the loan and that the Luxury Imports account in any event should have been transferred to the new Sacramento branch when it opened so that the account should not have counted against the San Jose branch's accounts receivable for the year. In short, Almudai expressed that in light of his branch's revenue performance, the way DSC handled the three branch write-offs for purposes of his bonus calculation was unfair for all these reasons. Cook forwarded to higher management Almudai's request to be exempted from the 3.99 percent write-off ceiling for branch performance bonus eligibility but that request was denied.

Because he did not receive the 2007 branch performance bonus to which he believed he was entitled, the amount of which was $77,952, Almudai quit his employment with DSC, effective January 31, 2008.

II. *Procedural Background*

Almudai filed his complaint in April 2008. It alleged for a first cause of action that DSC had failed to timely pay him wages owed in the form of bonuses for 2006 and 2007 in violation of Labor Code section 202. For a second cause of action, Almudai alleged that DSC's failure to timely pay wages owed was willful and therefore in violation of Labor Code section 203, justifying waiting time penalties. He sought an accounting for his third cause of action.

DSC answered the complaint by general denial, which also asserted various affirmative defenses.

In June 2008, DSC filed a motion for summary judgment, contending that the causes of action of the complaint had no merit because no bonuses were owed and there were no triable issues of material fact the resolution of which might prove otherwise.[4] Its separate statement of undisputed material facts listed 35 facts. Almudai opposed the motion, asserting that some 21 of the facts listed by DSC as undisputed were actually

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[4] DSC alternately moved for summary adjudication "as to all issues deemed appropriate by the [c]ourt." But Code of Civil Procedure section 437c, the summary judgment statute, allows for adjudication only of an entire cause of action or affirmative defense except in the case of a claim for punitive damages as specified in Civil Code section 3294 or an issue of duty, neither of which is at issue here. (Code Civ. Proc., § 437c, subd. (f)(1).) It does not otherwise allow for piecemeal adjudication of claims. And when moving for summary adjudication, the moving party must specify in its notice of motion the causes of action, affirmative defenses, claims for damages, or issues of duty as to which summary adjudication is sought. (Cal. Rules of Court, rule 3.1350(b).) Thus, DSC's motion could only have been treated by the court as one for summary judgment on the entire complaint and not for adjudication of anything less than that.

disputed.[5] And he contended that an additional 36 disputed facts required denial of the motion. DSC replied that Almudai had cited no evidence that actually disputed those facts.[6]

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[5] While Almudai may not have contemplated an appeal when he filed his opposition, it included many pages of deposition transcripts that were formatted with four pages reduced to a single page. He apparently highlighted relevant portions of the transcripts for the benefit of the trial court. But, of course, the record on appeal, which is here comprised only of a clerk's transcript, does not show those highlights and we are left with a record that is not just excessive in length because entire deposition transcripts are included but one that is also difficult to read because of the reduced size of the four-by-one deposition-transcript pages. There are also many DSC documents contained in the record that are either illegible or extremely difficult to read because of the small font size of the print and poor images in copying. When appearing before and seeking relief from a court, whether the already over-burdened trial court or a reviewing court, the parties might consider maximizing the user friendliness of the documentation they submit.

[6] DSC filed a declaration of Martin McFarland, the company's Chief Financial Officer, with its moving papers. The declaration addressed the manner in which defaulted accounts were written off, among other things. After Almudai filed his opposition and before DSC filed its reply, the parties entered into a written stipulation, which became an order of the court. The stipulation and order provided that DSC could amend its separate statement of undisputed material facts "to reflect certain information to be set forth in an [a]mended [d]eclaration of Martin McFarland." They further provided that the hearing on the motion would be continued in order to allow Almudai the opportunity to respond to DSC's new evidence and amended separate statement. DSC then amended its separate statement, adding seven facts asserted to be undisputed. All the new facts were supported by the supplemental McFarland declaration, which in essence corrected certain statements made in his original declaration. In response, Almudai filed his own amended responsive separate statement, but he did not submit any additional evidence in opposition to the motion.

Ordinarily, out of due process considerations, in assessing whether the moving party has met its burden on a summary judgment motion, a court will only consider what is presented in the moving papers. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.) If the movant fails to meet that burden based on the moving papers, the court will deny the motion and need not even evaluate the opposing party's evidence. (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 353-354.) But here, after Almudai filed his opposition, the parties stipulated and the court ordered that DSC could amend its originally filed separate statement and could submit new evidence cited therein in the form of the supplemental McFarland declaration. Almudai was provided with the opportunity to respond to the later-filed papers and the hearing was continued to accommodate this. Because of these

The trial court granted the motion.[7] Its order said that DSC had established that Almudai had been "paid all bonus compensation that he was eligible to receive for 2006 and 2007," citing 39 numbered undisputed facts from the parties' separate statements, and that Almudai had "failed to raise a triable issue of material fact." Judgment was later entered, from which Almudai timely appealed.[8]

DISCUSSION

I. *Issue on Appeal and Standard of Review*

On appeal from the grant of summary judgment, and as in the trial court, the overarching issue on summary judgment is whether the papers filed in connection with the motion demonstrate the existence of a triable issue of material fact that requires a trial. "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) Summary judgment is warranted if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) Summary judgment, though sometimes drastic, is no longer a disfavored remedy, its salutary effect being the expeditious and efficient disposition of

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unusual circumstances, for purposes of our review in determining whether DSC met its initial burden on the motion thereby causing a burden shift, we will consider DSC's amended separate statement and the supplemental McFarland declaration as having been filed with the original moving papers. (*Weiss v. Chevron, U.S.A., Inc.* (1988) 204 Cal.App.3d 1094, 1097-1099 [court properly considered evidence submitted on reply in granting summary judgment where opposing party was provided with notice and an opportunity to respond].) We interpret this to be the effect of the stipulation and order.

[7] The record on appeal does not include a reporter's transcript of the hearing.

[8] Almudai initially appealed from the order granting summary judgment but because that order is not directly appealable and the appeal lies only from the ensuing judgment, we will disregard his first notice of appeal. (Code Civ. Proc., § 437c, subd. (m)(1).)

cases lacking any merit. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 248; *Aguilar, supra,* 25 Cal.4th at p. 854 [purpose of 1992 and 1993 amendments to summary judgment statute was to liberalize the granting of summary judgment motions].)

A defendant who moves for summary judgment bears the initial burden to show that the action or cause of action has no merit—that is, "that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subds. (a), (p)(2).) When the burden of proof at trial will be on the plaintiff by a preponderance of the evidence, the moving defendant must "present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence' " to support a necessary element of the cause of action. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003, quoting *Aguilar, supra*, 25 Cal.4th at p. 854; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

If the defendant fails to meet this initial burden, it is unnecessary to examine the plaintiff's opposing evidence; the motion must be denied. (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose*, *supra*, 174 Cal.App.4th at pp. 353-354; *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 59-60.) But if the defendant makes a prima facie showing that justifies a judgment in its favor, the burden then shifts to the plaintiff to make a prima facie showing that a triable issue of material fact exists. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists, but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, 25 Cal.4th at p. 850, fn. omitted.)

On appeal, we review a grant of summary judgment de novo, deciding independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) We view the evidence in the light most favorable to the opposing party, liberally construing that party's evidence and strictly scrutinizing that of the moving party. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.) In conducting our review, we employ the same three-step process as the trial court: We examine the pleadings to ascertain the elements of the plaintiff's claim; the moving party's papers to determine whether the defendant has established facts justifying judgment in its favor; and, if the defendant did meet this burden, plaintiff's opposition to decide whether he or she has demonstrated the existence of a triable issue of material fact. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 84-85.) If there is no triable issue of material fact, we affirm the summary judgment if it is correct on any legal ground, whether that adopted by the trial court or not. (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.) Even though review is de novo, an appellant still bears the burden of affirmatively demonstrating error and must point out the triable issues the party claims are present by citation to the record and any supporting authority. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126; *Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230.) Like in any appeal, review is limited to issues adequately raised and briefed. (*Ibid*.)

II. *The Issue Framed by Almudai's Complaint*

The pleadings set the outer boundaries of materiality on a motion for summary judgment. Claims and matters that are not pleaded are outside the scope of the motion and cannot form the basis of a triable issue of material fact warranting its denial. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250.)

Accordingly, we look to Almudai's complaint to ascertain the scope of materiality of DSC's motion.

As noted, the complaint pleaded for a first cause of action that DSC had failed to timely pay wages in violation of Labor Code section 202. That section provides in pertinent part at subdivision (a) that if "an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting." There is no dispute that for purposes of this section, bonuses owed qualify as wages. (Lab. Code, § 200, subd. (a); *Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal.App.4th 509, 522.) Thus, in moving for summary judgment, DSC had to demonstrate as to this cause of action that there was no triable issue of material fact to dispute the conclusion that wages in the form of bonuses for 2006 and 2007 were not owed to Almudai when he quit his job in January 2008, and that the cause of action consequently had no merit, entitling DSC to judgment on the cause of action as a matter of law.

Almudai's second cause of action alleged that DSC's failure to pay wages owed under Labor Code section 202 was willful, justifying waiting time penalties under Labor Code section 203. Thus, if DSC bore its burden of demonstrating entitlement to judgment on Almudai's first cause of action by showing an absence of a triable issue of material fact to dispute the conclusion that wages were not owed to Almudai, that same showing would demonstrate its entitlement to judgment on the second cause of action, which is derivative of the first. In other words, if no wages were owed, there can have been no willful failure on DSC's part to have paid them. The same is true for Almudai's third cause of action for an accounting of wages and penalties owed.

Accordingly, if we conclude that DSC demonstrated its entitlement to summary judgment on Almudai's first cause of action, our review is over and there is no need to proceed to the second and third causes of action.

III. *The 2006 Bonus*

According to DSC, Almudai was not owed a branch performance bonus for 2006 because the San Jose branch did not earn 80 percent of its EBT, or annual budget target, as adjusted in accordance with established DSC policies for determining bonus eligibility. The unadjusted EBT for the new San Jose branch was -$88,242 (see page three of the Income Statement Actual vs. Comp Budget, EBT-Pre Management Bonus). The EBT was adjusted in accordance with regular company policy to allow for 3.5 percent bad debt expense, resulting in an adjusted EBT of -$23,873. The branch's actual performance numbers for the year came in at -$50,528. In order to be at 80 percent of target, the actual loss could not have exceeded 120 percent of the budgeted loss. Here, the actual loss was 211 percent of the budgeted loss, meaning that the branch's actual performance fell well short of reaching the threshold (see Income Statement Actual vs. Budget, Bonus Accrual Analysis 2006 and Bonus Calculation Supplemental Schedule For the Twelve Months Ending December 31, 2006). There is undisputed evidence in the form of the supplemental McFarland Declaration that adjustments made to the San Jose branch's EBT for 2006 were done in accordance with regular DSC policy.

With respect to the 2006 branch performance bonus, Almudai primarily contends that DSC never provided a budget target or EBT that reflected that the San Jose branch was open only for five months that year. The EBT, he contends, rather assumed that the branch opened in February and it was calculated, unfairly, based on an 11-month year, stacking the deck against Almudai's bonus eligibility. But, as DSC argues, Almudai offered no evidence to demonstrate the existence of a triable issue of material fact that the EBT was calculated in an improper manner or one that violated a specific term or policy of Almudai's employment or DSC's bonus plan. Nor does he point to a specific provision of the bonus plan that he contends is ambiguous and should be construed differently so as to dictate that the San Jose branch performance for 2006 should have been measured against a different target.

Absent demonstrating a triable issue of material fact regarding DSC's violation of an employment term or policy regarding its calculation of bonus eligibility; its violation of a specific provision of the operative bonus plan in establishing the EBT for 2006; or a specific ambiguity in the bonus plan that should be construed differently, Almudai fails to overcome DSC's undisputed prima facie showing that no branch performance bonus was due for 2006 in accordance with DSC's bonus eligibility requirements. This is the only issue raised by the complaint, which, as we have said, delimits the outer scope of materiality on the motion. Issues of fairness in the way bonus eligibility was calculated are outside this scope because the complaint pleads only the failure to pay wages owed in the form of bonuses under Labor Code section 202. It pleads no theory of relief, whether in tort or contract, for which the fairness of the manner in which Almudai's 2006 bonus eligibility was calculated is relevant.

Almudai also contends that the branch EBT for 2006 should not have been adjusted as it was, in accordance with DSC's policy, to allow for bad debt expense. This contention also goes to the fairness of the bonus eligibility calculation and fails for the same reason that such fairness issues are not raised by the complaint. Almudai bases this contention on the asserted fact that the adjustment policy was not fully articulated until it was published in the 2007 Management Guide for Branch Compensation Programs. But, even if the fairness of the bonus eligibility calculation were relevant, Almudai testified in deposition that at the beginning of his employment in 2006, based on the Letter of Intent and his receipt of the document entitled "2006 Bonus Breakdown Area Service Manager," he generally understood "the overall picture" of the bonus policy. And he did not dispute with evidence that in 2006, he received the monthly form report entitled Bonus Calculation Supplemental Schedule, which reflected adjustments made to the EBT such that he was aware of them for bonus eligibility purposes. Further, he acknowledges in briefing that the more fully articulated 2007 bonus plan was the same as that in effect in 2006.

In sum, Almudai failed to raise a triable issue of material fact to dispute DSC's prima facie showing that he was not owed a branch performance bonus for 2006, based on its bonus eligibility calculations applied in the ordinary course according to its policies.

IV. *The 2007 Bonus*

According to DSC, Almudai was not entitled to a branch performance bonus for 2007 because even though the San Jose branch performance well exceeded its adjusted EBT for the year, its three write-offs taken in that year—the Auto Nexus, Gilroy Mitsubishi, and Luxury Imports accounts—constituted 4.18 percent of the branch's rolling average accounts receivable, which exceeded the allowable percentage by .19 percent (write-offs of $348,086 divided by rolling average receivables of $8,322,228). Almudai raises several contentions to dispute this determination, all of them relating either to the calculation of the rolling average receivables for the San Jose branch, or the calculation of write-offs. But none of these contentions raise a triable issue of material fact so as to defeat DSC's showing that no bonus was owed. We address each contention in turn.

A. *The Opening of the Sacramento Branch as Affecting the Rolling Average Receivables*

Almudai contends that by opening a Sacramento branch in 2007, DSC somehow modified some unidentified aspect of the existing bonus plan without his consent and that to be consistent with the existing plan, DSC should have included the new Sacramento branch's rolling average accounts receivable among the San Jose branch's average receivables, increasing their total for bonus eligibility purposes. This would have in turn decreased to under four percent the loan write-offs attributable the San Jose branch, entitling Almudai to a branch performance bonus, the branch having satisfied the other threshold of meeting 80 percent of EBT.

But, as DSC correctly argues, Almudai points to no specific employment or contract term and to no specific aspect of the bonus plan that addresses adjustments to bonus criteria when a new branch is opened or that was modified by DSC in proceeding as it did. He offers no evidence that DSC was obligated to include receivables associated with the new Sacramento branch within the San Jose branch's receivables for bonus eligibility purposes, or that DSC was precluded from opening the new branch, or was somehow obligated to make such adjustments for the benefit of the San Jose branch when it did so. And the argument is flawed in any event by its failure to account for the write-offs attributable to the Sacramento branch, which may have increased the total write-offs to over four percent of the total rolling average receivables in any event. In other words, Almudai argues for the benefit of the Sacramento branch business without accepting its liabilities. In short, he failed to show the existence of a triable issue of material fact affecting DSC's calculation of the rolling average accounts receivable in light of its having opened a new Sacramento branch in 2007.

B. *The Calculation of the Write-Offs*

Regarding the manner in which DSC calculated write-offs for purposes of determining Almudai's 2007 bonus eligibility, he first contends that just as the San Jose branch acquired accounts when it opened, some of which were in default, the Luxury Imports of Sacramento account—written off in 2007 in the amount of $179,187—should have instead been attributed to the Sacramento branch when it opened. Doing so would have had the effect of lowering the percentage of write-offs for the San Jose branch to under four percent, the ceiling for branch performance bonus eligibility.

But in making this argument, as with his others, Almudai articulates no evidentiary or legal basis for the claim. The undisputed evidence was that DSC's policy was to assign an account, wherever generated, to the branch that could best serve the particular customer, based on the regional manager's assessment in consultation with general managers. There is no evidence that the San Jose branch's retention of the Luxury Imports account after the opening of the Sacramento branch was anything other than a proper application of this policy by DSC. And this account assignment did not violate any articulated employment or contractual agreement or any specific term of the bonus plan. Further, Almudai points to no contractual ambiguity that should be construed in a manner so as to have obligated DSC to assign the account differently. Accordingly, based on the single theory of relief pleaded in Almudai's complaint, DSC's election to maintain this account with the San Jose branch after the opening of the Sacramento branch did not give rise to any legal or factual claim of his entitlement to a branch performance bonus for 2007.

The same is true of Almudai's similar claim that DSC was obligated not to attribute the Auto Nexus account, written off in 2007 in the amount of $54,762.67, to the San Jose branch because this account had originated in Los Angeles and was in default from the time it was assigned to the San Jose branch at inception. Again, Almudai is in essence asserting that DSC's decision to keep this account assigned to the San Jose branch, which meant it would count against the ceiling of allowable bad debt for bonus eligibility purposes when it was written off, was not fair. But putting fairness aside as we must because it is not raised by the pleadings, there is no fact in the record that disputes that DSC was entitled to handle account assignments exactly as it did. Therefore, its assignment of the Auto Nexus account to the San Jose branch, and its attribution of the write-off accordingly, violated no agreement or policy affecting Almudai's bonus eligibility.

Almudai also contends that the manner in which DSC generally handled write-offs improperly affected his entitlement to a 2007 branch performance bonus. This claim has subparts. First, he asserts that he should have been given the opportunity before the Luxury Imports account was written off to reduce the debt by repossessing cars that constituted collateral for the debt under security agreements. Instead, DSC wrote off the account as soon as Luxury Imports filed for relief in bankruptcy and did not further exercise its security interest. Although this, like other actions that DSC took, in the end affected Almudai's bonus eligibility, he offers no evidence that DSC acted improperly or violated any agreement or policy by writing off the account when it did and declining to enforce its security agreement in the context of a bankruptcy proceeding.

Second, Almudai contends that based on statements by Cook, his supervisor, the Auto Nexus and Gilroy Mitsubishi accounts were written off in 2006 and accordingly should not have counted against his branch bonus eligibility for 2007. But even though Cook may have given Almudai that impression, the evidence is undisputed that DSC applied its formal write-off policy to these accounts in the ordinary course and that they were, in fact, written off in 2007.

As a matter of policy, DSC has three criteria that must be met before an account can be formally written off. Almudai was aware of this. First, "the account must have been in workout (Default Dealer Status) for a minimum of 120 days. Second, all collateral securing the account must have been liquidated, meaning all units repossessed by DSC have to have been sold. Third, DSC must have received no payments from the customer for a specified period of time." Until sometime in the summer 2007, that period was 60 days, but after that it was reduced to 30 days. A corporate committee that meets monthly makes a determination whether an account meeting these criteria will be written off as bad debt "so as to maintain compliance with the covenants set in [DSC's] credit facility with its lenders" and accounts are written off as soon as they are eligible. In making write off determinations, the committee "does not consider to which branch an account belongs, but only considers the overall portfolio of the company and its lender requirements." The record is undisputed that under this policy, DSC actually wrote off the Auto Nexus and Gilroy Mitsubishi accounts in 2007, not 2006, and that these accounts were thus properly included among the San Jose branch write-offs in 2007.[9]

The record does include evidence that Cook indeed told Almudai that these accounts were written off in 2006, at least inferring that they would not be counted against his bonus eligibility for 2007. But we conclude that this evidence was not material to the motion, given that the scope of materiality was defined by the complaint, which pleaded only that wages in the form of bonuses were owed under Labor Code section 202. When given the opportunity to address this in supplemental briefing, Almudai contended that this evidence was material because it invoked the doctrine of promissory estoppel, an equitable theory of relief that, if applicable, would estop DSC from recognizing these write-offs in 2007.

"Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.' " (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) In other words, the doctrine serves as a substitute for consideration. (*Youngman v. Nevada Irrigation. Dist.* (1969) 70 Cal.2d 240, 250.) The Restatement Second of Contracts, section 90, subdivision (1), states the doctrine as follows: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of a promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." (*Id.* at p. 242; see

[9] Almudai makes much of the fact that DSC documentation generated in 2006 showed the accounts as having been "C/Off" in 2006 and he contends that this disputes that the accounts were actually written off in 2007. It does not and this issue is a red herring. Whether different people understood the notation "C/Off" to mean "cut off date" or "charge off" is irrelevant because the evidence is undisputed that whatever the meaning, the Auto Nexus and Gilroy Mistubishi accounts were actually written off in 2007 in accordance with DSC's write-off policy.

Kajima/Ray Wilson, supra, 23 Cal.4th at p. 310; *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6, adopting Rest.2d, Contracts, § 90.) To be binding, the promise must be clear and unambiguous. (*Lange v. TIG Ins. Co.* (1998) 68 Cal.App.4th 1179, 1185.) The party claiming estoppel must specifically plead all facts relied on to establish its elements, one of which is detrimental reliance. (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 48.)

As we have observed, the complaint here pleads minimal facts, and, as relevant, only those stating a claim for wages owed under Labor Code section 202. It does not plead promissory estoppel or facts giving rise to that theory of relief. A party cannot resist summary judgment on a theory of relief that is not pleaded and an opposition cannot create triable issues of material fact on unpleaded claims. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 332-333; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1252-1258.) Accordingly, that Cook may have told Almudai that accounts were written off in 2006 or inferred that they would not count against his 2007 bonus eligibility was not relevant or material to the motion based on the state of the complaint.[10]

Relative to the manner in which DSC wrote off accounts, Almudai finally contends that the amounts written off for the Auto Nexus and Gilroy Mitsubishi accounts

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[10] The same is true of other areas of disputed fact in the record that our review revealed. In supplemental briefing, Almudai asserted that these other areas were likewise material under an unpleaded promissory-estoppel theory of relief. His briefing also suggests the relevance of the disputed evidence under possible unpleaded theories of relief in tort. And we have mentioned that Almudai's arguments on appeal raise issues of the fairness of DSC's actions in determining his bonus eligibility, which might be relevant if the complaint had alleged a breach of the covenant of good faith and fair dealing inherent every contract. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371-372, quoting Rest.2d Contracts, § 205; *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031.) But, as noted, a party cannot successfully defeat summary judgment by showing the existence of triable facts relating to unpleaded theories of relief.

exceeded what the respective amounts should have been because they included previously undisclosed and unitemized “account level charges.” He asserts that there is a factual dispute about the proper amounts of the charges and that eliminating the additional account level charges would have the effect of reducing the percentage of write-offs to under four percent of the branch’s rolling average receivables, entitling him to a bonus.

But the record is undisputed that when DSC writes off an account, the amount written off as bad debt includes amounts owing by the dealer plus various adjustments called account level charges, which are all fees posted by DSC to the account “that are not specifically associated to any one vehicle/advance” and that are due to “bad checks received from the dealers, audit fees, and legal expenses associated with collection on the accounts.” The account level charges are not part of the documentation generated by the corporate write-off committee when dealing with a delinquent account and thus documentation exists in the record that does not show the full amount of these charges included in the delinquent balance. But the full amount of these charges is included in the amounts actually written off and counted against a “branch’s financial performance for purposes of determining branch performance based bonus compensation.” Any discrepancy in the record in the amounts to be written off relative to the Auto Nexus and Gilroy Mitsubishi accounts is thus fully and consistently explained and such discrepancy could not create a triable issue of material fact that compelled denial of the motion.

C. *Conclusion Re 2007 Bonus Eligibility Calculations*

Although Almudai raises many ways in which the calculations for his 2007 bonus eligibility could have been done differently so as to entitle him to a branch performance bonus, he has failed to raise a triable issue of material fact to dispute the prima facie conclusion that he was not owed this bonus, based on DSC’s bonus eligibility calculations applied in the ordinary course according to its policies.

DISPOSITION

The judgment is affirmed.

Duffy, J.

WE CONCUR:

Rushing, P.J.

Premo, J.